SUPREME COURT, U. S.

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FILED
DEC 3 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-646

SYSTEM COUNCIL T-4, COMPRISED OF LOCAL UNIONS 134, 165, 315, 336 AND 399 OF THE INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD and ILLINOIS BELL TELEPHONE COMPANY,

Respondents.

BRIEF OF ILLINOIS BELL TELEPHONE COMPANY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 446 F 2d 815 (Pet. App. 3-9). The decision of the National Labor Relations Board is reported at 179 NLRB No. 119.

JURISDICTION

The petition should be dismissed because it was filed too late. The period allowed by statute ended ninety days after the denial of rehearing below. That day was Tuesday, November 9, and the petition was filed two days later without an excuse. 28 USC 2101(c); *Pittsburgh Towing Co.* v. *Mis-*

sissippi Valley Co., 385 US 32 (1966); *Levine* v. *United States*, 380 US 915, 967 (1965).

QUESTION PRESENTED

Whether the Board and the Court of Appeals abused their discretion in deciding that Illinois Bell had not violated the National Labor Relations Act.

STATEMENT OF THE CASE

This case involves only well-settled law. The Board's General Counsel charged the Company with violating Section 8(a)(1) and (3) of the Act by threatening to change the seniority of certain strikers, and by actually doing so. The pertinent parts of the Act are:

> "Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> > "(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
> >
> > • • •
> >
> > "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ."

At the hearing it became perfectly clear that the Company had not changed anyone's seniority. The Board's General Counsel thereupon ceased to make any claim under Section 8(a)(3) and confined his case to the relation of Section 8(a)(1) to a company statement of June 4, 1968. Trial Examiner's Decision, footnote 7. The Trial Examiner found that the Company had not violated the Act in any respect. Board Chairman McCulloch and Member Zagoria approved all of the Trial Examiner's decision; Member Brown dissented, but solely with respect to the relation of the company statement of June 4 to Section 8(a)(1). The Court of Appeals unanimously sustained the Board.

Petitioners continue to allege a threat to seniority. But their "fundamental" claim is that the *General Electric* decision in 80 NLRB 510 (1948) should be overruled to require for the first time that days absent on an economic strike must always be counted as if they were days worked for the purpose of fixing the amounts of future fringe benefits. The consequence of their argument would be full pay for all persons on strike.

ARGUMENT

I. THE FINDINGS OF THE NATIONAL LABOR RELATIONS BOARD ARE BASED UPON SUBSTANTIAL EVIDENCE ON THE RECORD AND SHOULD NOT BE REVIEWED BY THIS COURT

Section 10(f) of the Act provides that the Board's findings of fact shall be "conclusive" "if supported by substantial evidence on the record considered as a whole. . . ." Section 10(c) of the Act provides in part that the Board may enter an order against a respondent only "upon the preponderance of the testimony taken. . . ."

There is no claim that any of the Board's procedures were unfair, or that its personnel were biased or unfamiliar with the evidence. The record is adequate, simple and without any conflicts.

II. THE MESSAGE OF JUNE 4 DID NOT VIOLATE THE NATIONAL LABOR RELATIONS ACT

On June 4, 1968, the Company sent a message to all of its employees which is quoted in the opinion of the Court of Appeals. Everyone involved in this case except petitioners agrees that the Company had the right to do exactly what that message said. One of the Board members thought that the message implied a threat to seniority, although that subject was not specifically mentioned in the message. His view

was rejected by the other two members of the Board panel and by a unanimous Court of Appeals. In any event, this issue turns on the particular facts of this case, and is not of sufficient general importance to warrant review by this Court.

The Board specifically found at page 12 of the Trial Examiner's decision in this case that the Company's motive was "a legitimate business interest" and not "anti-union considerations." Petitioners' accusations of discriminatory motives, never having been supported by the requisite prpof or findings, must be rejected. *Radio Officers' Union* v. *NLRB*, 347 US 17 (1954), cited by petitioners on this point, was a case in which the Board reached the opposite conclusion, and is not controlling here.

Petitioners assert a conflict with *Tex Tan Welhausen Co.* v. *NLRB*, 419 F 2d 1265 (5th Cir.), vacated on other grounds, 397 US 819 (1970), enforced as modified, 434 F 2d 405 (5th Cir., 1970), cert. den., 402 US 973 (1971). On the contrary, that case was properly cited by the Seventh Circuit in its opinion as supporting its decision in this case. 446 F 2d at 819. The *Tex Tan* strike was caused by the employer's unfair labor practices, and the workers' vacation rights were "already proportionately reduced for the time the workers were on strike . . . ." 419 F 2d at 1271. Neither the Fifth Circuit nor the Board ever objected to that proportionate reduction because of that strike; they prevented a "further complete forfeiture . . . ." 419 F 2d at 1271.

III. THE COMPANY'S REFUSAL TO COUNT ALL OF THE STRIKE TIME AS "SERVICE" WAS LAWFUL

Petitioners' principal contention is that "strikers maintain their employer-employee relationship and continue to be entitled to all of the rights and benefits derivative there-

from." Pet. Brief, p. 10. "Since the employer and employee relaticnship is the source of all employee rights . . . a continuation of that relationship must result in the entitlement to such benefits." Pet. Brief, p. 8. But these sweeping generalizations prove too much. Petitioners' theory would apply just as fully to paying hourly wages during a strike as it does to increasing a worker's rights to pensions, vacations and other work-connected fringe benefits merely because of the passage of time during a strike. Petitioners' contention was fully answered by the Court of Appeals, particularly in the last paragraph of its opinion. It was also discussed and rejected by the Trial Examiner. His conclusion on that point was accepted by the Board without objection.

The Board has repeatedly held that since strike time is not paid for, it need not be treated as work time in computing the amount of future employer fringe payments such as vacations and pensions. Strikers are not rendering "service"; they are withholding it. *General Electric Co.*, 80 NLRB 510 (1948); *Kimberly-Clark Corp.*, 171 NLRB No. 82 (1968); *Evening News Assn.*, 185 NLRB No. 70 (1970); *Roegelein Provision Co.*, 181 NLRB No. 72 (1970); *Ace Tank Co.*, 167 NLRB 663 (1967).

The courts have consistently held that such rights to fringe benefits from the employer as vacations, pensions and insurance can and should be related to production and wages. *Inland Steel Co.* v. *NLRB*, 170 F 2d 247, 253 (7th Cir.), cert. den., 336 US 960 (1949), enforcing 77 NLRB 1 (1948); *Pittsburgh-DesMoines Steel Co.* v. *NLRB*, 284 F 2d 74 (9th Cir., 1960); *Quality Castings Co.* v. *NLRB*, 325 F 2d 36 (6th Cir., 1963); *Melville Confections, Inc.* v. *NLRB*, 327 F 2d 689, 692 (7th Cir., 1964).

The cases cited by petitioners show that an employer cannot cancel rights which had already accrued when a strike began. *NLRB* v. *Erie Resistor Corp.*, 373 US 221 (1963)

(20 years of super-seniority given to nonstrikers); *NLRB* v. *Great Dane Trailers, Inc.*, 388 US 26 (1967) (accrued vacation benefits paid to non-strikers but denied to strikers); *NLRB* v. *Fleetwood Trailer Co.*, 389 US 375 (1967) (new hires preferred over economic strikers). But the instant case is easily distinguishable. Illinois Bell paid all vacation benefits based on service prior to the strike; the restrictions on service credit for time lost due to strike absence apply only to eligibility for larger benefits payable in future years.

The decisions cited by petitioners were also cases in which the Board exercised its judgment *against* an employer in a particular fact situation, and in which special reliance was placed by this Court on that exercise of judgment. 373 US at 230-3; 388 US at 33-4; 389 US at 378. But in the case at bar the Board and the Seventh Circuit have both exercised their judgment in favor of the employer's position in a case with different facts.

The record shows that "seniority" in this case may affect such matters as the choice of vacation times, the choice of shifts, the sequence of layoffs, and the making of promotions. These are all rights of one employee as against all others, and the Company did not change them. But "service" (which the Company did adjust) is a completely different concept which affects such other and different benefits as the length of vacations, the maximum amount of sickness payments, and the size and starting date of pensions. These are rights of each employee as against the employer. "Seniority" and "service" are dealt with separately in the union contract (G. C. Ex. 2, particularly in Article XXI), and it is important that they be kept distinct for a proper analysis of this case. The Board certainly kept them separate, relying on "uncontradicted credited testi-

mony" and a past practice of "many years" (Trial Examiner's Decision, fn. 2, pp. 3, 6-8). Petitioners' brief repeatedly confuses the two concepts.

CONCLUSION

The petition should be dismissed for lateness. If the merits are considered, it should be denied.

Respectfully submitted,

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